No. 09-763

IN THE

Supreme Court of the United States

DARNIECE BAILEY TURNIPSEED, RAMON TURNIPSEED AND RAYMOND THOMAS,

Petitioners,

v.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IN HER OFFICIAL CAPACITY AND THE COUNTY OF COOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the Illinois Appellate Court below that Plaintiffs failed to state a claim under the Takings Clause of the Fifth Amendment rests upon a state law ground that is independent of the federal question and adequate to support the judgment.

2. Whether a person who voluntarily enters into a bail bond agreement under Section 110-7(a) of the Illinois Code of Criminal Procedure is entitled to interest under the Takings Clause of the Fifth Amendment on money paid pursuant to this agreement, where the terms of the contract provide for a return of up to 90% of funds paid but not interest.

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STATEMENT OF THE CASE

I. Background.

As the trial court in this matter recognized, "a bail bond is a form of contract between the government on the one part and the accused and surety on the other." (Pet. App. 28.) When an individual enters into this bail bond contract, the Clerk of the Circuit Court of Cook County, Illinois (the "Circuit Clerk") receives bail bond money under the authority of the court and keeps the money solely to be disposed of as directed by statute. *See* 725 ILCS 5/110-7 (2010); *see also A-1 Lithoplate, Inc. v. AFS Publishing*, 66 Ill. App. 3d 560, 562, 384 N.E.2d 395, 396 (Ill. App. Ct. 1978).

Section 5/110-7 of the Illinois Code of Criminal Procedure ("Section 110-7") states that if the bailed person satisfies the bond's requirements and has been fully discharged from all obligations, the Circuit Clerk returns an amount up to 90% of the bail bond deposit and retains the remaining 10% as "bail bond costs." (725 ILCS 110-7(f); Pet. App. 66.) If a person fails to meet the conditions of the bail bond, the circuit court may enter an order of forfeiture and the State's Attorney may institute proceedings to have the bail bond money declared forfeited and for the entry of judgment on the balance of the bond account. (Pet. App. 66.) Section 110-7 does not direct that the Circuit Clerk give the person posting bail the interest earned on the bail deposit when it is returned to them. (*See* 725 ILCS 110-7; Pet. App. 66.)

Upon the execution of bail bonds, the Circuit Clerk places such funds in an interest bearing account, or interest bearing instruments. (Pet. App. 66.) This is pursuant to Cook County Ordinance 93-O-45, which provides: "All elected and appointed public officials of Cook County are directed to invest public funds in their possession or for which they are custodians in interest-bearing accounts . . . ." (Pet. App. 47.)

On or about February 2, 2002, plaintiffs Darniece Bailey Turnipseed and Ramon Turnipseed executed a bail bond known as a "D" bond[1] for Ms. Turnipseed and posted $100 in cash for the $1,000 bail that an Illinois criminal court set for her. (Pet. App. 70.) After Darniece Bailey Turnipseed satisfied all of the terms of her bail, the Circuit Clerk returned $90 to her. (Pet. App. 70.) In a similar vein, Plaintiffs allege that plaintiff Raymond Thomas[2] executed a "D bond" by posting $17,500 in cash for the $175,000 bail that an Illinois court set for his brother. (Pet. App. 70.) Plaintiffs allege that after all of the conditions of the bond were satisfied, the Circuit Clerk returned $15,750 to Thomas (*i.e.*, the amount of bond minus 10%). (Pet. App. 70-71.)

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1. As the trial court stated, "a 'D' bond is a 'deposit bond.' The issuing judge sets the amount of bail and the defendant is required to post 10% of that amount in order to obtain release." (Pet. App. 26.) A "D" bond is issued under Section 110-7. *See* 725 ILCS 110-7 (2010).

2. Petitioners Thomas, Darniece Bailey Turnipseed and Ramon Turnipseed will hereinafter be referred to as "Plaintiffs."

II. Proceedings Below.

Plaintiffs filed a complaint against respondents Cook County (the "County") and the Circuit Clerk (collectively "Defendants") alleging that: (a) interest on bail bond deposits was private property that belonged to Plaintiffs; and (b) Defendants violated the Takings Clauses of the United States and Illinois Constitutions when such interest was deposited in the county treasury. Plaintiffs subsequently amended their complaint. (Pet. App. 62-79.) Plaintiffs also moved for class certification. (Pet. App. 2.)

Defendants moved to dismiss Plaintiffs' Second Amended Complaint, Pet. App. 8-9, and filed a response to Plaintiffs' motion for class certification. (Pet. App. 24, 39.)

On August 19, 2008, the circuit court entered an order denying Defendants' motion to dismiss and granting Plaintiffs' motion for class certification. (Pet. App. 23-41.) On September 18, 2008, Defendants filed a petition for leave to appeal this interlocutory order to the Illinois Appellate Court pursuant to Illinois Supreme Court Rule 306(a)(8). On October 16, 2008, the Illinois Appellate Court entered an order granting Defendants' petition for leave to appeal. (Pet. App. 9.)

On May 4, 2009, the Illinois Appellate Court issued an opinion reversing the trial court's orders certifying Plaintiffs' lawsuit as a class action and denying Defendants' motion to dismiss. (Pet. App. 1-22.) The Illinois Appellate Court found that "plaintiffs failed to state a valid cause of action, and thus their suit must be dismissed." (Pet. App. 22.)

Plaintiffs then filed a petition for leave to appeal to the Illinois Supreme Court. On September 30, 2009, the Illinois Supreme Court denied Plaintiffs' petition for leave to appeal. (Pet. App. 43.)

REASONS FOR DENYING THE PETITION

As a matter of Illinois law, no property interest of Plaintiffs was taken and on that State law basis, Plaintiffs' claims under the Takings Clause were properly dismissed. *Turnipseed v. Brown*, 391 Ill. App. 3d 88, 100, 908 N.E.2d 546, 555-556 (Ill. App. Ct. 1978). (Pet. App. 1-22.) The court below also found that Section 110-7(f):

> requires the clerk to pay 90% of the bail amount to "the accused or to the defendant's designee." The subsection is completely silent about interest. Although subsection (f) is detailed in many respects, it does not use the word "interest" once.

Id., 391 Ill. App. at 91, 908 N.E.2d at 548. (Pet. App. 5.) Plaintiffs acknowledge that Section 110-7 does not direct the return of interest earned on cash that is ultimately returned to the party who posted the cash. (Pet. App. 74.)[3] The court below found that Plaintiffs

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3. Even if the criminal defendant satisfies the conditions of bail, the person who posted bail may receive less than 90% of the funds posted, as Illinois law allows bail funds to be applied to other obligations. *See, e.g., Turnipseed*, 391 Ill. App. at 94, 908 N.E.2d at 550 (stating that "bail bond money may be used to pay court costs, attorney fees, child support obligations, and financial obligations of the defendant incurred in a different (Cont'd)

did not retain any private property interest in the bail bond posted under Section 110-7 and had no contractual, statutory or common law right to interest on cash ultimately paid to them pursuant to their bail bond contracts. *Id.* at 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. The court below, therefore, determined that under Illinois law, Plaintiffs did not have a property right taken from them. *Id.*

As a result, the dismissal of Plaintiffs' claims under the Takings Clause rests on adequate and independent state law grounds, and this Court lacks subject matter jurisdiction to review this decision. *See, e.g., Florida v. Powell*, __ U.S. __, 2010 U.S. LEXIS 1898, *11-*12 (February 23, 2010) (recognizing that this Court will not review a question of federal law decided by a state court if the decision rests on a state law ground that is independent of the federal question and adequate to support the judgment).

In addition, the non-availability of interest accrued on cash paid pursuant to Illinois bail bond contracts is not an example of a State using private property without compensation, as Plaintiffs have no property right to such interest.

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case"). *See also People v. Carrasquilla*, 167 Ill. App. 3d 1069, 1076, 522 N.E.2d 139, 143 (Ill. App. Ct. 1988) (Section 110-7 authorizes courts to apply bail deposits to pay fines in criminal cases, even where third-party claims on the funds exist); *People v. Nicholls*, 71 Ill. 2d 166, 374 N.E.2d 194 (Ill. 1978) (interpreting Section 110-7(h) to allow cash bail deposits to be used to pay the costs of an unsuccessful appeal.)

Moreover, Plaintiffs did not advance a procedural due process claim below. In any event, because Plaintiffs had no property right in the interest accrued on their bail bond deposits, the decision below did not sanction the summary forfeiture of property rights in contravention of cases from this Court, such as *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), requiring notice and an opportunity to be heard prior to the deprivation of property.

Finally, the decision below does not conflict with any decisions from this Court or other State court decisions interpreting federal law.

Accordingly, and for the reasons set forth below, this Court should deny the Petition.

I. This Court Lacks Jurisdiction Over This Matter Because The Decision Of The Illinois Appellate Court Rests On State Law Grounds Independent Of Plaintiffs' Claims Under The Takings Clause And Adequate To Support The Judgment.

It is well established that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (stating that when the state court decision "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.")

The application of Illinois law with regard to Plaintiffs' claims under the Takings Clause can be summarized as follows:

- Under Illinois law, a bail bond agreement is a contract. *People v. Rubright*, 241 Ill. 600, 603, 89 N.E. 713, 714 (Ill. 1909); *People v. Woollums*, 63 Ill. App. 3d 602, 606, 379 N.E.2d 1385, 1388-1389 (Ill. App. 1978);

- The terms of this contract are the terms of the statute. *See* 725 ILCS 5/110-7 (2010); *Bob Cole Bail Bonds, Inc. v. Arkansas*, 260 S.W.3d 754, 99 Ark. App. 354, 357 (Ark. Ct. App. 2007);

- The bail bond contract does not call for the payment of up to 90% of cash posted plus interest. The contract only calls for the payment of cash in accordance with the statutory formula in Section 110-7(f) (in an amount up to 90% of the cash posted), subject to other obligations that the person posting the bond may have. *See Turnipseed*, 391 Ill. App. 3d at 92-93, 908 N.E.2d at 549-550; (Pet. App. 7-8); 725 ILCS 5/110-7(f) (2010); and

- As a result, Plaintiffs' property right is their contractual right to payment of the sum indicated by operation of the statutory formula and nothing more. *Turnipseed*, 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. (Pet. App. 15.)

Because the State took no property from Plaintiffs, the court below held that their claims under the Takings Clause failed as a matter of law. *Turnipseed*, 391 Ill. App. 3d at 100, 908 N.E.2d at 555 (stating that because "plaintiffs have no right to the interest, there can be no taking of it"). (Pet. App. 21-22.) Significantly, this holding is based on Illinois law, is independent of the federal question and is adequate to support the judgment.

A. In Illinois, Bail Bond Agreements Are Contracts.

Illinois courts have long held that a bail bond agreement is a contract, as have at least forty other States.[4] *United States v. Santiago*, 826 F.2d 499, 502-

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4. *See* **Alabama**: *Swift v. Esdale*, 293 Ala. 520, 524, 306 So. 2d 268, 272 (Ala. 1975); **Arizona**: *Gearing v. Arizona*, 536 P.2d 1051, 1052 (Ariz. Ct. App. 1975); **Arkansas**: *Bob Cole Bail Bonds, Inc. v. Arkansas*, 99 Ark. App. 354, 357, 260 S.W.3d 754 (Ark. Ct. App. 2007), *Zoller v. Arkansas*, 284 Ark. 118, 120, 680 S.W.2d 87, 89 (Ark. 1984); **California**: *People v. American Contractors Indemnity Co.*, 33 Cal. 4th 653, 657, 93 P.2d 1020, 1022 (Cal. Ct. App. 2004), *Overland v. Superior Court of Los Angeles County*, 126 Cal. App. 4th 131, 141, 23 Cal. Rptr. 3d 676, 683 (Cal. Ct. App. 2005); **Colorado**: *People v. Saint John Tyler*, 797 P.2d 22, 25-26 (Colo. 1990), *Rodriquez v. People*, 191 Colo. 540, 541, 554 P.2d 291, 293 (1976); **Connecticut**: *State v. Garvin*, 242 Conn. 296, 305, 699 A.2d 921, 925-926 (Conn. 1997); **Delaware**: *State v. Mitchell*, 212 A.2d 873, 884 (Del. Super. Ct. 1965); **Florida**: *Reyes v. McCray*, 879 So.2d 1269, 1271 (Fla. Dist. Ct. App. 2004); **Georgia**: *Cullifer v. Georgia*, 101 Ga. App. 231, 113 S.E.2d 218 (Ga. Ct. App. 1960); **Idaho**: *State v. Rocha*, 131 Idaho 113, 116, 952 P.2d 1249, 1252 (Idaho Ct. App. 1998); **Indiana**: *Cozart v. Wolf*, 185 Ind. 505, 511-512, 112 N.E. 241, 242 (Ind. 1916); **Illinois**
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503 (7th Cir. 1987) (recognizing that under Illinois law, a bail bond is a contract); *Rubright*, 241 Ill. at 603, 89 N.E. at 713-714 (holding that a bail bond is a contract); *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389 (same). Illinois and other States are free to recognize bail bond agreements pursuant to a statutory scheme as contracted agreements.[5]

Under their bail bond contract, Plaintiffs were entitled to a payment of up to 90% of the cash posted for their bond, provided that they satisfied the terms of the agreement. *See Turnipseed*, 391 Ill. App. 3d at 93, 908 N.E.2d at 549. The bail bond agreement did not provide for the payment of interest accrued on cash returned pursuant to the contract. *Id.*, 391 Ill. App. 3d at 96, 908 N.E.2d at 552. (Pet. App. 8.)

Thus, Defendants' refusal to pay Plaintiffs interest on their bail bonds does not constitute a "taking" because Defendants did not confiscate Plaintiffs' private property. *Id. See also Kleinschmidt Inc. v. County of Cook*, 287 Ill. App. 3d 312, 678 N.E.2d 1065 (Ill. App. Ct. 1997) (holding that a landowner who voluntarily entered into a contract to sell land in lieu of condemnation could not later file a claim under the Takings Clause of the United States and Illinois Constitutions.) Instead, Plaintiffs voluntarily paid cash in order to free criminal

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171 Vt. 464, 470, 769 A.2d 623, 627 (Vt. 2000); and **Wisconsin**: *State v. Braun*, 100 Wisc. 2d 77, 83, 301 N.W.2d 180, 183 (Wisc. 1981).

5. Montana, for example, does not appear to hold that a bail bond agreement is a contract. *See Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309 (Mont. 1995).

defendants from custody and, in so doing, entered into contracts. *See Rubright*, 241 Ill. at 603, 89 N.E. at 713-714; *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389.

Because a bail bond "is a contract, existing law becomes part of the contract, as though the contract contains an express provision to that effect." *State v. Rocha*, 131 Idaho 113, 116, 952 P.2d 1249, 1252 (Idaho Ct. App. 1998). Indeed, any "statutes or rules that relate to a bail bond are implicitly read into the bail-bond contract." *Bob Cole Bail Bonds, Inc. v. Arkansas*, 99 Ark. App. at 357. In Illinois, Section 110-7 sets forth the terms of Plaintiffs' bail bond contracts. Section 110-7(f) provides for nothing more than the payment of up to 90% of the bail deposit upon completion of the bail bond agreement.

B. In Accordance With Illinois Law, The Court Below Properly Found That Plaintiffs Had No Property That Was Taken.

In determining whether Plaintiffs stated a viable claim under the Takings Clause, the court below considered whether Plaintiffs had a property right to interest that accrued on the amount of cash ultimately paid to Plaintiffs pursuant to the bail:

> Since there can be no taking, unless there was a right to the thing allegedly taken, we will consider first whether plaintiffs had a right to the interest. . . There is no statute or contract which gave plaintiffs a right to the interest. As noted above, the statute is silent

> concerning interest. 725 ILCS 5/110-7(f) (West 2006). To the extent that the statute formed the basis of a contract, then this contract was also silent about interest.

Turnipseed, 391 Ill. App. 3d at 96, 908 N.E.2d at 552. (Pet. App. 14-15.) Following its prior decision in *Gonzalez v. Danaher*, 30 Ill. App.3d 992, 332 N.E.2d 603 (Ill. App. Ct. 1975), the court below then found that under Illinois law, Plaintiffs had no property right taken by Defendants:

> A plaintiff must have a legal right to property, before he or she can claim there was a taking; and in *Gonzalez*, we found that an accused had no legal right to the interest that had accrued on his bail deposit — no statutory right, no contract right and no common-law right. *Gonzalez*, 30 Ill. App. 3d at 994. Without a legal right, there can be no basis for plaintiffs' claims under the takings clauses; and thus *Gonzalez* precludes their claims, even though the word "taking" was not used in that case.

Turnipseed, 391 Ill. App. 3d at 98, 908 N.E.2d at 554, *citing Gonzalez*, 30 Ill. App. 3d at 994, 332 N.E.2d at 604-605. (Pet. App. 18.)

State law creates property interests, not the Federal Constitution. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) *citing Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Plaintiffs' property interests in this case derive from the bail bond contracts into which Plaintiffs entered, the terms of

which are set forth in Section 110-7. Drawing on two sources of Illinois law (statutes and the common law of contracts), the court below determined that Section 110-7 created no property right to interest.[6]

Not surprisingly, the court below explicitly stated that it had a duty to "consider all nonconstitutional issues, before proceeding to rule on a constitutional ground." *Id.*, 391 Ill. App. 3d 96, 908 N.E.2d 552. (Pet. App. 15.) In so doing, the court concluded that persons who pay bail bond money do not retain ownership rights in such money pursuant to the bail bond contract.

Discussing Illinois case law and particularly *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 449

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6. Defendants advanced another State law basis for denying Plaintiffs' claims under the Takings Clause. In Illinois, a claim for interest is really a claim for compensation for the loss of use of money. *Illinois State Toll Highway Authority v. American Nat'l Bank & Trust Co. of Chicago*, 162 Ill. 2d 181, 199, 642 N.E.2d 1249, 1257 (1994). Defendants argued that Plaintiffs' Takings Clause claims for interest were constitutional tort claims, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709, (1999), and that Illinois' economic loss doctrine also barred Plaintiffs from bringing claims for interest in tort that they could not bring under the bail bond contracts. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982). *See also Calcagno v. Personalcare Health Management, Inc.*, 207 Ill. App. 3d 493, 501, 565 N.E.2d 1330, 1335 (Ill. App. Ct. 1991) (stating that the loss of the use of money is an economic loss that the *Moorman* doctrine precludes in tort). Because the appellate court below held that no property of Plaintiffs was taken, it declined to "reach defendants' argument based on the *Moorman* doctrine." *Turnipseed*, 391 Ill. App. 3d at 100-101, 908 N.E.2d at 556. (Pet. App. 22.)

N.E.2d 65 (Ill. 1983), *Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 399 N.E.2d 1295 (Ill. 1980) and *Canel v. Topinka*, 212 Ill. 2d 311, 818 N.E.2d 311 (Ill. 2004), the court below noted, "the depositors [in those cases] expected to be restored to their full ownership rights at the conclusion of the dispute." *Turnipseed*, 391 Ill. App. 3d 99, 908 N.E.2d 555. "By contrast," the court explained, "in the case at bar, there are many reasons why the depositors may not receive back all of the bail money." *Id.*, 391 Ill. App. 3d 100, 908 N.E.2d 555. (Pet. App. 21.) "Thus, depositors of bail bond money do not necessarily expect to receive their money back, even if the accused appears in court." *Id.* (Pet. App. 21.)

As a matter of Illinois law, bail bond money paid pursuant to Section 110-7 does not remain the private property of the payor and, thus, no constitutional question arises as to interest accrued on bail bond money paid to the State. Instead, a payor retains only a contractual right to payment of the statutory amount upon successful completion of his or her contractual obligations.

Consequently, the decision below ordering the dismissal of Plaintiffs' claims under the Takings Clause rests on an independent state law ground that is adequate to sustain the judgment of the court below.

C. The Independent And Adequate State Ground Doctrine Precludes Review Of The Court Below.

In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Coleman*, 501 U.S. at 729. "[B]ecause this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id., citing Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

This Court recently observed that it does not decide "abstract dispute[s] about the law." *Alvarez v. Smith*, 130 S. Ct. 576, 580-581 (2009) (holding that a "dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies'" in Article III). Review of the judgment below would constitute an advisory opinion, as this Court cannot review the decision of a State court construing State law. On this basis alone, this Court should deny the Petition.

II. This Case Is Not An Example Of A State Using Private Property Without Compensation. (Response to Plaintiffs' Petition at 22-23.)

In the present case, when Plaintiffs posted bail, they paid 10% of the bail amounts set by an Illinois court. In so doing, Plaintiffs entered into a contract, *Rubright*, 241 Ill. at 603, 89 N.E. at 713-714 and *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389, and relinquished control to the title of the cash they paid. In this respect, the present case is readily distinguishable from cases where an owner seeks interest on unclaimed property that the State had been holding on behalf of the owner. *See* Petition at 22-23, *citing Canel v. Topinka*, 212 Ill. 2d 311, 818 N.E.2d 311 (Ill. 2004). In *Canel*, for example, the plaintiff owned stock that the State of Illinois had been holding as unclaimed property. As the court below explained in construing Illinois law, in cases such as *Canel*, "the depositors expected to be restored to their full ownership rights at the conclusion of the dispute." *Turnipseed*, 391 Ill. App. 3d at 199, 908 N.E.2d at 555. (Pet. App. 20.) The plaintiff in *Canel* always retained full ownership of the stock, and title for the stock never passed to the government.

Here, Plaintiffs did not retain title to the money they paid pursuant to the bail bond agreement. They instead transferred all interest in their money to the government and retained only a *contractual* right to

the payment of an amount up to 90% of these bail deposits.[7]

Unlike the government entities in the cases that Plaintiffs cite, the Circuit Clerk was not acting as custodian of Plaintiffs' property. Rather, the Circuit Clerk administers a contract between Plaintiffs and the State in which Plaintiffs could receive a maximum amount equal to 90% of their bail if they complied with the terms of the bail and lesser amounts (depending upon statutory setoffs) down to 0%, if they did not comply with the terms of the contract. Plaintiffs' contention that the State was using Plaintiffs' private property without compensation is legally erroneous because it ignores the effect of the parties' respective contractual rights, particularly the Plaintiffs' right to receive the return of up to 90% of cash posted pursuant to Section 110-7(f).

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7. *Compare Alvarez v. Pappas*, 229 Ill. 2d 217, 890 N.E.2d 434 (2008) (holding that a taxpayer who overpays his or her taxes does not *own* such overpayments but rather has a *statutory right* to seek a refund). While *Alvarez v. Pappas* concerns a statutory right to a tax refund as opposed to a contractual right under a bail bond agreement, the case is nonetheless analogous. Just as a taxpayer who overpays his taxes does not own the overpaid taxes but rather a statutory right to a refund, a person who pays cash pursuant to a bail bond agreement does not own the cash but rather has a contractual right to payment of a sum of money, upon satisfaction of the contractual conditions of the bond.

III. Plaintiffs Have Waived Any Procedural Due Process Claims, And Even So, There Is No Due Process Violation, As Plaintiffs Have No Statutory Or Common Law Property Right To The Interest Accrued On Their Bail Bonds.

(Response to Plaintiffs' Petition at 20-21.)

A. Plaintiffs Have Waived Any Procedural Due Process Claim.

Plaintiffs present for review an issue that was not raised below: "Whether the immediate and automatic forfeiture of the interest earned by the County on Plaintiffs' private property – the interest earned on their bail bond deposits – violates due process." This question appears to frame a procedural due process claim. However, no such issue is raised by any claim in Plaintiffs' Second Amended Complaint, the operative pleading before this Court, and this issue was neither advanced by Plaintiffs nor addressed by the courts below. Under Illinois law, Plaintiffs have waived this argument. *See, e.g., Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 493, 916 N.E.2d 22, 28 (Ill. App. 2009) (holding that "arguments not raised in the trial court or argued in the appellant's brief on appeal are waived").

Further, Count I of the Second Amended Complaint purports to state a facial taking claim under the Fifth Amendment to the United States Constitution, as well as Article I, §15 of the Illinois Constitution, on the basis that private property may not be taken for public use without just compensation. (Pet. App. 73-75; Second Am. Compl., ¶¶ 32-36, 38.) Count II of the Second

Amended Complaint, which is seemingly duplicative of Count I, purports to state a claim under 42 U.S.C. § 1983 for violation of Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution, for the alleged taking of Plaintiffs' private property without just compensation. (*See* Pet. App. 76-78; Second Am. Compl., ¶¶ 44-49, 51.) Because no procedural due process claim was raised below, nor addressed by the lower courts, Defendants object to its presentation here and certiorari should not be granted on this question. *See Howell v. Mississippi*, 543 U.S. 440, 441, 125 S. Ct. 856, 857 (2005)(writ of certiorari dismissed as improvidently granted where federal constitutional issue not raised in, or addressed by, state supreme court); *Illinois v. Gates*, 462 U.S. 213, 217-19, 103 S. Ct. 2317, 2320-22 (1983) (under 28 U.S.C. § 1257, this Court will refrain from deciding questions not presented or decided in the highest court of the state whose judicial action the court is called upon to review).

B. Even If Plaintiffs Did Not Waive Their Purported Due Process Claim, The Decision Below Does Not Conflict With the Due Process Clause.

Plaintiffs assert that the failure to pay interest that accrued on a bond amounts to a forfeiture of private property without a hearing in violation of the Due Process Clause. *See* Petition at 20, *citing Degen v. United States*, 517 U.S. 820, 822 (1996). Plaintiffs' position is legally groundless.

In *Degen*, this Court stated "[i]n an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen*, 517 U.S. at 822, *citing United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993) and *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). This Court has recognized the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *James Daniel Good*, 510 U.S. at 48, *citing United States* v. *$ 8,850*, 461 U.S. 555, 562, n.12 (1983). Prejudgment replevin statutes, for example, require notice and an opportunity to be heard. *Fuentes*, 407 U.S. at 80.

Here, in marked contrast, the court below found that Plaintiffs have no property right to any money other than the amount to which they are contractually entitled. *Turnipseed*, 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. Without the existence of a property right to interest, Plaintiffs' claim that such property was taken without due process fails.

Plaintiffs also argue that the existence of accrued interest on Plaintiffs' bail bond funds should trigger the statutory standards found in 725 ILCS 110-7(g) for the forfeiture of the deposit itself. (Petition at 21.) Once again, this argument fails, as Plaintiffs have no property right in accrued interest under Illinois law. As the decision below held, "the legislature did not intend to confer a statutory right to recover interest" and "plaintiffs have no common law right to recover interest." *Turnipseed*, 391 Ill. App. 3d at 100, 908 N.E.2d at 555. (Pet. App. 21.) Because "plaintiffs have no right

to interest, there can be no taking of it." *Id.* (Pet. App. 22.) Thus, as to any interest accrued on Plaintiffs' bail bond funds, Defendants need not comply with forfeiture standards under 725 ILCS 110-7(g).[8]

Furthermore, the cases that Plaintiffs cite in support of their due process argument are inapplicable to the present case. In *State v. Sav. Union Bank & Trust Co.*, 186 Cal. 294, 199 P. 26 (Cal. 1921), for example, the California Supreme Court held that some judicial proceeding is necessary to perfect an escheat. Likewise,

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8. 725 ILCS 110-7(g) states as follows in pertinent part:

> "[i]f the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings."

725 ILCS 110-7(g) (2010). Nothing in this statute refers to the interest accrued on Plaintiffs' bail bond funds. Furthermore, because the contractual agreement between the County and those posting the bail bond funds is silent as to interest, 725 ILCS 110-7(g) has no application to interest accrued on such funds.

in *State v. Phoenix Sav. Bank & Trust Co.*, 60 Ariz. 138, 132 P.2d 637 (Ariz. 1942), the Arizona Supreme Court found that the state escheat statute was unconstitutional because it failed to require the State to escheat a deposit only when it provided for a judicial determination of the jurisdictional facts, which are (a) death, and (b) lack of heirs and intestacy, and because it failed to give proper opportunity for all persons interested in the deposit to appear and contest these two issues. Similarly, both *Clovis Nat'l Bank v. Calloway*, 69 N.M. 119, 364 P.2d 748 (N.M. 1961) and *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (N.J. 1953) involve specific, procedural challenges to the states' escheat statutes.

The present case is more analogous to *Schilb v. Kuebel*, 46 Ill.2d 538, 544 (1970), and *Schilb v. Kuebel*, 404 U.S. 357 (1971), where this Court considered the constitutional validity of assessing costs against a bail deposit. In *Schilb*, the Illinois Supreme Court upheld the constitutionality of section 110-7(f) (Ill. Rev. Stat. 1983, ch. 38, par. 110-7(f)), which allowed the clerk of the court to retain 10% of the bond deposit for administrative costs, as conforming to fundamental concepts of due process and equal protection of the law. In affirming this decision, this Court stated that the situation "is not one where we may assume that the Illinois plan works to deny relief to the poor man merely because of his poverty." *Schilb*, 404 U.S. at 370. Subsequently, in *Andrews v. Danaher*, 62 Ill. 2d 268 (1976), the Illinois Supreme Court upheld the same provision against the claim that the State unlawfully imposed a fee upon the accused for exercising his constitutional right to bail.

Plaintiffs have not stated a due process claim and the decision below does not conflict due process cases from this Court.

IV. No Split Of Authority Exists Between The Decision Below And The Decisions Of This Court Or Other State Courts.

The decision below does not conflict with any decisions of this Court. Furthermore, the decision below does not conflict with other State courts regarding an issue of federal law.

A. No Split of Authority Exists Between The Decision Below and The Decisions of This Court.

(Response to Petition at 12-18.)

The decision below does not conflict with this Court's decisions in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). Plaintiffs contend, however, that this Court's holding in these cases that interest earned on private property is itself private property, which the government cannot retain without compensating its owner, is applicable in the present case. (Petition at 15.) It is not, as Plaintiffs do not own property being held by the State. *See Turnipseed*, 391 Ill. App. 3d at 96-98, 908 N.E.2d at 552-553. (Pet. App. 13-16.)

Unlike the instant case, the property owners in *Webb's*, *Phillips* and *Brown* did not enter into

contractual relationships with the government and, in all of these cases, the government was obligated to return all of the property it was holding to the owners of that property. Here, Plaintiffs' bail bond contracts under Section 110-7 do not entail the State holding onto property belonging to the Plaintiffs. Thus, the interest earned on such property does not belong to Plaintiffs in the absence of a contractual right to such interest.

Webb's, *Phillips* and *Brown* are all factually dissimilar to this case, and therefore, this Court's reasoning in those cases is inapplicable here. In *Webb's*, for example, no contractual relationship existed between the county and the property owner. Rather, *Webb's* involved a county's taking as its own, under the authority of a Florida statute, the interest accruing on an interpleader fund deposited in the registry of a county court where the deposited fund was concededly private and was required by statute in order for the depositor to avail itself of statutory protection from the claims of creditors and others. *Webb's*, 449 U.S. at 159-165. Additionally, in *Phillips*, no contractual relationship existed between the parties, and this Court's holding was limited to its determination of the existence of a property interest in the interest accrued on client funds that lawyers were required to deposit in "interest on lawyers' trust accounts" ("IOLTA"). Finally, in *Brown*, no contractual relationship existed between the parties, and the case again involved a narrow issue concerning the state of Washington's IOLTA programs, which were established to pay for legal services for the needy. *Brown*, 538 U.S. at 240-241.

Likewise, the decision below does not conflict with *Henkels v. Sutherland*, 271 U.S. 298 (1926). (Petition at 12-14.) In *Henkels*, the United States seized common stock belonging to the plaintiff pursuant to the Trading with the Enemy Act (the "Act"). The United States then sold the stock and placed the proceeds in interest bearing government securities. A lower court ultimately determined that Henkels was not an alien but an American citizen and ruled under the Act that he was, therefore, the proper owner of the proceeds of the sale of his stock. This Court held that because Henkels was the owner of the stock, he was entitled not only to the proceeds of the sale of the stock but also to any interest earned on these proceeds. *Id.* at 301. *Henkels* is readily distinguishable from the present case and the decision below does not conflict with *Henkels*.

In *Henkels*, the ownership or property interest in the proceeds of the sale of the plaintiff's stock was determined as a matter of federal law under the Act. Based on this determination, the United States returned the proceeds from the sale of Henkels' property, and this Court found that the plaintiff was also the owner of the interest accrued on the proceeds. Here, under Illinois law, Plaintiffs had no continuing ownership interest in the bail bond funds or the interest accrued thereupon. *Turnipseed* does not conflict with *Henkels*, as the cases are factually distinguishable.

The decision below does not conflict with any decision of this Court and, on that basis, the Petition should be denied.

B. No Split Of Authority Exists Between The Courts Of Illinois, California and Montana Regarding An Issue Of Federal Law.
(Response to Petition at 18-20.)

While the facts in *Henkels*, *Webb's*, *Phillips* and *Brown* are markedly different from the present case, the case with the most similar fact pattern to the present case is *Overland v. Superior Court of Los Angeles County*, 126 Cal. App. 4th 131, 141, 23 Cal. Rptr. 3d 676, 683 (Cal. Ct. App. 2005), *cert. den.*, 126 S.Ct. 426 (2005). *Overland*, like the decision below, concluded that the bail bond agreement did not provide for interest that accrued on cash paid pursuant to the contract, that no property belonging to plaintiff was "taken" and that the plaintiff's claim under the Takings Clause was not viable. Just as *Turnipseed* was decided on a principle of Illinois law, *Overland* was decided on the basis of California law.

In *Overland*, the plaintiffs deposited cash bail to secure the appearance of individuals charged with criminal offenses. Upon the satisfaction of these bonds, the cash that was posted was returned to the plaintiffs. The plaintiffs then sought pre-exoneration interest on their cash bail deposits. The defendants refused to pay such interest. The *Overland* plaintiffs (like Plaintiffs here) then filed a lawsuit alleging that the defendants' refusal to pay such interest was an unconstitutional taking of the plaintiffs' property in violation of the Takings Clause.

Significantly, the *Overland* plaintiffs relied on the same cases that Plaintiffs cite in their Petition: *Phillips v. Washington Legal Foundation*, 524 U.S. 156

(1998) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). Because the facts in *Phillips* and *Webb's* were inapplicable to the bail bond agreement in *Overland* (as well as the bond agreement here), the *Overland* court held that the plaintiffs' reliance on these cases was misplaced, stating that:

> Those cases involved the involuntary taking by the government of private property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use, namely, to fund legal services for low income individuals. Those circumstances implicate the Fifth Amendment, which requires the payment of just compensation when private property is taken for public use. However, those constitutional concerns are absent here.
>
> The court defendants' refusal to pay petitioners interest on their cash bail deposits does not constitute a "taking" because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when petitioners voluntarily deposited cash bail to free the criminal defendants from custody, petitioners entered into contracts with the government by which petitioners guaranteed the appearance of the criminal defendants released on bail at all required court proceedings.

Overland, 126 Cal. App. 4th at 140, 23 Cal. Rptr. 3d at 683. The court found that "[a] bail transaction is a contract" and that this contractual obligation "is defined

by applicable statutory law and language of the bond itself." *Id.* 126 Cal. App. 4th at 141, 23 Cal. Rptr. 3d at 683. The court added that "[a]lthough the case law typically involves bail bonds, rather than cash bail deposits, that is a distinction without a difference for purposes of the discussion herein." *Id.*

In *Turnipseed* and *Overland* — the two cases in the United States that have considered whether a claim could be filed under the Takings Clause for interest that accrued on a bail bond where a bail bond contract did not provide for the payment of such interest — both courts reached the same conclusion: the parties' respective contracts precluded claims under the Takings Clause. Thus, in both *Turnipseed* and *Overland*, a determination of State law defeated Plaintiffs' federal constitutional claim.

Plaintiffs, however, argue that the decision below creates a conflict with the decision of the Montana Supreme Court in *Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309, 312-313 (Mont. 1995). *Siroky* held that a county's retention of the interest money on a bail bond cash deposit violates the due process and takings clauses of the Montana Constitution and the Takings Clause of the Fifth Amendment. (Petition at 18-20.) For two reasons, no such conflict exists.

First, the decision below that Plaintiffs had no property right taken was decided under Illinois law. *Siroky* itself acknowledged that "[p]roperty interests are created not by the constitution, but by independent sources such as state law." *Siroky*, 894 P.2d at 310. Neither the decision below nor *Overland* detracts from

the authority of the Montana Supreme Court to hold that a property right to interest on bail bonds exists under Montana law. A holding on what property rights State law creates cannot create a split of authority regarding an interpretation of federal law warranting review by this Court.

Second, in *Siroky*, the Montana Supreme Court did not even consider the contractual defenses common to *Overland* and the present case. In this regard, *Siroky* did not consider the contractual nature of the bail bond agreement and the defenses available under the contract (*i.e.*, the fact that no contractual provision provided for interest). Further, *Siroky* did not address the argument that Defendants raised here and the defendant raised in *Overland*: the refusal to pay interest on cash bail deposits does not constitute a "taking" because there was no confiscation of private property but rather a voluntary contractual agreement. *Siroky* did not acknowledge that the bail bond agreement is a contract. It would appear from *Siroky* that under Montana law, a bail bond is not considered a contract, or if it is, that an interest requirement is built into it. Montana has the ability to determine the parameters of its bail bond scheme but, in doing so, cannot create a conflict with other States' decisions on how to establish their bail bond practices.

Overland is the current law in California[9] regarding

9. Interestingly, *Siroky* distinguished Montana law from California law by noting disapproval of *Fresno Firefighters' Local 753 v. Jernagan*, 222 Cal. Rptr. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 1986), which held that "the *public purpose* of bail (Cont'd)

the viability of a claim under the Takings Clause for interest on bail bonds and is consistent with the principles of Illinois law set forth in *Rubright*, *Woollums*, *Gonzalez* and *Turnipseed*. Under Illinois and California law, persons who post bail bonds have no property right to interest accrued on the portion of bail funds returned to them. Any determination in *Siroky* that Montana law reaches a different result does not warrant review from this Court.

V. Perceived Misstatements Of Law And Fact In The Petition.

Pursuant to Supreme Court Rule 15(2), Defendants cite the following perceived misstatements of fact and law in the Petition:

In the Petition, Plaintiffs state that interest accrued on the bail bond deposit for named Plaintiffs Darniece Bailey Turnipseed and Raymond Thomas was transferred to Cook County at the time their bond was refunded. (Petition at 7-8.) This misstates the process by which interest on bail bond deposits is accrued and

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(Cont'd)
justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court." *Siroky*, 894 P.2d at 312. However, the *Overland* court also rejected the *Fresno* rationale and stated that "[t]he reason there is no right to pre-exoneration interest on cash bail is not that the money was deposited for a public purpose. Rather, no interest is owed because the bail deposit is made in accordance with the terms of a particular contract and the terms of that contract do not include a provision for pre-exoneration interest." *Overland*, 126 Cal. App. 4th at 142. *Siroky* never considered this argument.

processed. As an initial matter, no segregated amount of interest is transferred, or even identified, at the time any bond is refunded. All bail bond funds are deposited into a Cash Bond Control Account maintained by the Clerk. Interest accrued on all accounts maintained by the Clerk, including the Bond Account, is transferred to the Cook County Treasurer on a quarterly basis.

Furthermore, certain fees and charges are connected with the Bond Account, as set forth in Defendants' response to Plaintiffs' motion for class certification. After the fees attributable to the bond deposit, processing and refund were subtracted, the $100 bond deposited for two months on behalf of Darniece Bailey Turnipseed would not have earned any net interest. Thus, even under Plaintiffs' own theory, no just compensation would be due to the Turnipseeds and, accordingly, their rights under the Fifth and Fourteenth Amendments would not have not been violated. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 240 (2002)(where no net interest would be earned on deposit to Interest on Lawyer Trust Accounts, no just compensation would be due and, therefore, there had been no violation of the Just Compensation Clause).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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